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No. 84-468

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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CITY OF CLEBURNE, TEXAS, *et al.*,
*Petitioners,*

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF FOR RESPONDENTS

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## STATEMENT OF QUESTIONS PRESENTED

1. Whether the City's intentional discriminations against mentally retarded persons, in its zoning ordinance on its face and in its denial of a special use permit, deny equal protection of the laws: (a) because they cannot withstand the rationality standard of judicial review; or (b) because they cannot withstand a higher standard of judicial review?

2. Whether exclusionary zoning classifications based on mental retardation are subject to heightened judicial scrutiny under the Equal Protection Clause?

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## BRIEF FOR RESPONDENTS

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The respondents, Cleburne Living Center, Inc. (now known as Community Living Concepts, Inc., and hereinafter referred to as "CLC"), Jan Hannah, and Advocacy, Inc., submit this brief in support of the Fifth Circuit's judgment and in response to the Brief for Petitioners filed by the City of Cleburne, Texas, and five of its officials (hereinafter "the City" or "Cleburne").

## STATEMENT OF THE CASE

This case raises a single but crucial issue for mentally retarded American citizens who "historically have been subjected to exclusion from the political process" and "isolated in remote, stigmatizing living arrangements." (J.A. 95, Trial Finding 32). May a city constitutionally use its zoning power to deny thirteen people the oppor-

tunity of living in a supervised group home in an apartment house district, simply because they are mentally retarded? The City of Cleburne's denial of this opportunity—to live in the first group home for retarded persons in the history of this city of nearly twenty thousand people (J.A. 94, Trial Finding 31; T. 18)—shut off access in Cleburne to what the trial court found to be "the principal community living alternative[] for persons who are mentally retarded[,]" and denied to the group home's thirteen prospective residents what the trial court determined is "an essential ingredient of normal living patterns" for retarded people (J.A. 94, Trial Finding 30).

CLC is a small Texas corporation whose purpose is the establishment and operation of group homes for persons who are retarded (J.A. 88, Trial Finding 1). In July, 1980, it began searching for an appropriate, available location in Cleburne for a group home to be operated as a "Level I Intermediate Care Facility for the Mentally Retarded (ICF/MR)," in accordance with Texas and Federal Regulations (T. 62-63).

It found and leased a large, four-bedroom house at 201 Featherston (J.A. 31-32, 92, Trial Finding 21; T. 63),[1] in a Cleburne area zoned R-3 for high density residential uses (J.A. 90, Trial Finding 10). In response to CLC's inquiries, the City classified the planned group home as a "hospital for the feeble-minded" under its 1965 zoning ordinance, after consulting nothing more than a dictionary to determine what constituted "feeble-mindedness." (J.A. 69; T. 366). As a consequence of its use classification, the group home was not a permitted use, despite the fact that such uses as hospitals, public

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[1] The City's suggestion that another, more appropriate location for an ICF/MR was available, *see* City's Br. 7 n.6, 26-27, is incorrect. The only city official who looked at it did not know if it could have met state standards (J.A. 46-47). It did not and, according to Texas officials, never would have (J.A. 48; T. 370).

schools, boarding houses, nursing homes, homes for delinquent juveniles, and halfway houses for paroled felons were permitted at the 201 Featherston location (J.A. 60-61; T. 276-77). A Texas Department of Health architect inspected the house, finding it adequate for its intended use (J.A. 73-74). A detailed comparison of the state's minimum space requirements for ICF/MR's with the 201 Featherston house determined that the house exceeded them in every respect (J.A. 76; T. 79; explained at T. 74-75, 77-78, 177-80).

The City's classification relegated CLC to seeking a one-year special use permit for the group home. Through its special use permit application, CLC presented the City with the following situation: The 201 Featherston home is on a larger corner lot near downtown Cleburne (T. 67). Abutting it to the south is a two-story apartment house, and across the street to the northeast is a dentist's office. Across the street is a public junior high school, which itself has among its students thirty mentally retarded children (J.A. 8 ¶ 18 & 19 ¶ 18; 92, Trial Finding 21). A public park and recreation facility, the public library, and the central business district are all within walking distance of the house (J.A. 75; T. 59, 175-77). The City's fire department is within less than a minute's response time (P.Ex. 14, T. 7). The house itself, which is on a 16,700 square foot lot with front, side, and back yards, is a one-story home with approximately 2,700 square feet of interior living space (T. 73, 133).[2] It also has a large, covered front porch stretching along two sides of the house (J.A. 8 ¶ 18 & 19 ¶ 18).

The residents would work at ordinary jobs in the community or in workshops (T. 66-68), and through living

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[2] The City's brief incorrectly states the size as 2,510 square feet, ignoring the testimony on this point (T. 73, 133) and the fact that D. Ex. 12 (J.A. 82-83) fails to list the square footage for all the interior portions of the house.

at the house, could exercise and increase their skills in such areas as independent living, work, and the use of community resources (T. 62, 66-70). Many of them would be from backgrounds of prolonged institutionalization or of highly protective family home environments (T. 70-72). Like ordinary residents, their stay would be voluntary and indefinite (T. 67). Staff members would be present around the clock, but none would live in the house (T. 112, 182).

Motivated primarily by the potential residents' retardation, the City's Planning and Zoning Commission voted in August to deny the special use permit (J.A. 94, Trial Finding 29). CLC then undertook an education campaign to overcome the prejudice by offering each of the city council members special packets of information about retardation and group homes and inviting them to tour the Featherston house (T. 179-181, 184-185). The council members were unresponsive to the tour invitation (T. 185) and the education effort. None of the three council members who voted against the permit had learned, even by the time of trial, the most basic rudiments of what retardation is. Councilmember Bass testified as follows:

Q. Well, what is mental retardation?
A. I don't know.
Q. Did you know at the time?
A. No.
Q. Did you make any effort to find out?
A. No.
Q. Before your vote?
A. No.
Q. Do you know now?
A. No.

Q. Have you learned any more about mental retardation since your vote?

A. Very little, if any.

(J.A. 24). Councilmember Johns testified:

Q. Do you know what mental retardation is?

A. Technically speaking, no.

Q. Well, what's your idea of what it is?

A. Technically speaking, I don't—I don't know . . .

Q. Well, I'm not speaking technically. I'm asking you what your idea of mental retardation is.

A. I would rather not guess, because I don't know.

. . . .

A. I don't think you would use the word "mentally retarded" if they weren't different from you.

Q. Well, what difference do you see?

A. I really don't know. I would say mentally unbalanced or something of that nature. I don't know what it means. I'm not a doctor.

(J.A. 27). Councilmember Martin testified:

Q. Can you tell the Court what mental retardation is? In your mind what it is?

A. I guess it would be unstable.

(J.A. 30).

In mid-October, the city council voted three to one to deny the permit, and shortly thereafter this litigation ensued. Both the trial court and the Fifth Circuit determined that the City's zoning ordinance intentionally discriminated against retarded people (J.A. 93, Trial Finding 24; 726 F.2d at 200, J.A. 131-32).[3] The Fifth

[3] This determination of intentional discrimination against retarded persons, as well as the finding of intentional discrimination against them in the denial of the special use permit (J.A. 94, Trial Finding 29), having been concurred in by both courts below, is

Circuit, however, rejected the trial court's legal determination that such intentional discrimination is permissible and, applying heightened judicial scrutiny, invalidated the ordinance on its face and as applied. The City now

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binding on this Court in the absence of a "very exceptional showing of error," *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214 (1948). *See also Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (Court is reluctant to disturb such fact findings). Each of the determinations also was a necessary prerequisite to establishing a violation of the Equal Protection Clause. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976). The City challenged neither determination before the Fifth Circuit, and the questions which it successfully asked this Court to review on certiorari did not embody such a challenge. Indeed, the necessary predicate for the questions' consideration is that intentional discrimination occurred. Therefore, the legitimacy of the findings of intentional discrimination are not even before the Court for review. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Nonetheless, the City liberally sprinkles its brief with claims that it did not intentionally discriminate against retarded persons in either aspect of the case. *See, e.g.*, City's Br. 28-29 (disagreeing with Fifth Circuit's determination that there was intentional discrimination on the face of the ordinance), *and* City's Br. 28 (claiming that special use permit denial "has nothing to do with discrimination[]"). Such unsupported arguments are irrelevant to the case as it has been accepted for review and will not be briefed by the respondents. It should be noted, however, that the ordinance imposes substantially more onerous administrative processes to permit retarded people's residence in group homes—required recurrently every year, even when initially administratively successful. This imposition is an impermissibly adverse classification, just as the special processes imposed on blacks in *Hunter v. Erickson*, 393 U.S. 385 (1969), were impermissible. *See also Yick Wo v. Hopkins*, 118 U.S. 356, 366, 370 (1886).

If for some reason the Court is inclined to delve into the findings of intentional discrimination and try to resolve the case on such grounds instead of reaching the significant issues before it that are premised on the validity of such findings, it should resist. Instead, it simply should dismiss the writ as improvidently granted because the cause will have become "an inappropriate vehicle for resolving the important constitutional issues raised by the [petitioners]," *New York v. Uplinger*, 104 S.Ct. at 2332, 2334 (1984).

seeks reversal of the Fifth Circuit's decision on each of two matters: whether the zoning ordinance's facially discriminatory treatment of retarded people denies them equal protection of the laws; and, if it does not, whether the City's denial of the special use permit, found by the trial court to be motivated primarily by the retardation of the group home's residents, is constitutional.

## SUMMARY OF ARGUMENT

The crux of this case is whether the mere possession of the trait of mental retardation makes a citizen less entitled to live meaningfully in an American community. The City of Cleburne, through its zoning powers, unconstitutionally has answered the question "yes." Using retardation as its justification, it has denied a group of retarded people access to the community by denying them the opportunity to live in what the trial court determined to be the principal community living alternative for them. The same number of virtually any other group of people—elderly people in nursing homes, tuberculosis patients in sanitariums, boarders, juvenile delinquents and paroled felons in halfway houses—are permitted to live together at the same place where retarded people were denied this opportunity. The Equal Protection Clause prohibits the City's blatantly exclusionary actions under whatever analytical standard the Court may employ.

The City's discriminatory actions were unconstitutional because they are not rationally related to any legitimate interest it claims it is furthering. The record is devoid of any substantiating basis for the zoning ordinance's discriminatory treatment of retarded people. In what are transparently *post hoc* rationalizations, the City has offered two principal justifications for its discriminatory ordinance, each of which is unsupportable. First, the ordinance is not aimed at protecting the well-being of retarded residents of group homes. It has no standards for implementing such protection, and it is administered

by people who admittedly know nothing about mental retardation and show no interest in learning. The only standards contained in the applicable portion of the ordinance are vague ones directed to the neighbors' interests.

Second, the record, including expert testimony, demonstrates that there is no connection whatever between possible legitimate interests of the neighbors—in traffic congestion, fire safety, and population densities—and the exclusion from the high density residential neighborhood of a group home for retarded people. Instead, the record demonstrates that the ordinance protects only one interest of the neighbors—the illegitimate one of simply not wanting to live near a group of retarded people.

The City's denial of the special use permit is invalid for similar reasons. As the trial court found, the permit denial was motivated primarily by the retardation of the group home's potential residents. The Equal Protection Clause does not permit the validation of an invidiously discriminatory action through the tautological argument that the action's objective was to discriminate.

Mental retardation is a quasi-suspect classification. The City's discriminatory actions and attempted justifications for them present a microcosm of why discriminatory, exclusionary actions against people who are retarded should be subjected to heightened judicial scrutiny under the Equal Protection Clause. Retarded people have been subjected to a long history of purposeful, unequal treatment; they have been isolated in remote, stigmatizing living arrangements; they have been politically powerless; and, through it all, they have been the victims of a thoroughgoing stigmatization based on an immutable trait acquired through no fault of their own.

Their literal and figurative isolation has been both the cause and the effect of the persistence of false and harmful stereotypes of who they are and what they can accomplish. These false stereotypes, mirrored here by the

City's reaction to the proposed group home, cause official action concerning retarded people to be misdirected. They are a central reason why the Court should view with suspicion official discriminatory actions against retarded people. A heightened scrutiny of classifications based on retardation will not invalidate all such classifications, but it will help insure that they are not based on false, archaic stereotypes.

The City's actions here clearly were based on such stereotypes. People who are retarded are entitled at a minimum under the Equal Protection Clause to have meaningful access to the community of citizens on an equal footing with other citizens.

## ARGUMENT

### I. The Zoning Ordinance on Its Face and the Special Use Permit Denial Both Violate the Equal Protection Clause, Even When Measured Against the Rational Basis Standard

The respondents first address whether the City's zoning actions can survive even the lower tier of scrutiny under the Equal Protection Clause for two reasons. First, although we believe that heightened scrutiny is fully warranted by the history of invidious discrimination against retarded people and by the other traditional indicia of suspectness, *see* Part II, *infra*, the City's zoning actions cannot pass even the minimum rationality test. Thus, the Court can find the City's actions unconstitutional without resolving the question of which tier of scrutiny is appropriate for discriminations based on mental retardation. *Cf. Zobel v. Williams*, 457 U.S. 55, 60-61 (1982) (if the scrutinized scheme cannot pass the minimal test, the Court need not decide whether enhanced scrutiny is appropriate); *O'Connor v. Donaldson*, 422 U.S. 563, 573

(1975).[4] Second, the City's reaction to the proposed operation of a group home for retarded people casts a revealing light on why classifications discriminating on the basis of mental retardation should receive heightened judicial scrutiny. The details set out here about the City's actions crystallize for the Court the legacy of this Nation's historical attitudes towards retarded persons: their exclusion from the community of citizens on the basis of unexamined, false stereotypes about them.

### A. *The Zoning Ordinance's Facial Discrimination Against Mentally Retarded Persons Is not Rationally Related to Legitimate Governmental Objectives*

The zoning scheme here is uniquely invidious. Permitted uses in an R-3, "Apartment house district" in the City of Cleburne include apartment houses, multiple dwellings, boarding and lodging houses, fraternity houses,

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[4] This case's core issue is the reach of the Equal Protection Clause when intentional discrimination against retarded people has been established. The rationality of the City's actions has been questioned at all stages of this litigation, and it is appropriate for the Court to decide the question. *See Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2699 (1984); *United States v. Arthur Young & Co.*, 104 S.Ct. 1495, 1501 n.12 (1984).

The United States, as *amicus curiae*, repeatedly raises the possibility that the City's zoning actions are unconstitutional because irrational. *See, e.g.*, U.S. Br. 6 (appellate court "may well supportably conclude" that special use permit denial was irrational"); U.S. Br. 7 n.2 (noting weakness of City's zoning decision in light of community benefits from community living arrangements for retarded people); U.S. Br. 10 ("entirely possible . . . that this very case represents . . . an irrational and invidious choice"). Yet, it ignores the preceding principles and suggests sending the case back to the Fifth Circuit for consideration of the rationality question. No party to the litigation has urged this unnecessary dilatory procedure, *see, e.g.*, City's Br. 43 (urging, *inter alia*, that the zoning actions be found constitutional under the rational basis test), and the Court should reject it.

dormitories, apartment hotels, eleemosynary institutions (other than penal institutions), and

> Hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the insane or feebleminded or alcoholics or drug addicts.*

Cleburne Zoning Ordinance, § 8(6) (emphasis added) (J.A. 61). When CLC notified the City that it planned to operate a group home for retarded people in an apartment house district, the City consulted a dictionary (T. 366), ascribed its confusion over the proper classification of the group home to the "oversight . . . of the authors" of the zoning ordinance (T. 355), and decided that the group home, despite having no doctors or nurses on its staff (T. 182-83), would be treated under subdivision 9 of Section 16 of the zoning ordinance as a *hospital* for the feeble-minded which could not operate unless it obtained a special use permit.

The residents' mental retardation was the motivation for this unusual and burdensome requirement. The trial court found as a fact that "[i]f the potential residents . . . were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." (J.A. 93, Trial Finding 24). The Fifth Circuit reached the same conclusion: "The same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded." (J.A. 131-32). Furthermore, the house could be used not only for a group home, but also for a nursing home, a fraternity, a hospital, or a sanitarium. Assuming for the moment that heightened scrutiny is inappropriate, the question for the Court is whether the ordinance's facial discrimination against mentally retarded people is consistent with the Equal Protection Clause under what has come to be known as the minimal rationality test enunciated in cases such as

*United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973) ("a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest").[5] Treating mentally retarded people differently from the elderly, the sick, or, for that matter, transients in boarding homes or students in a fraternity house, has no rational basis in an area zoned for multiple occupancy. It is, rather, a product of precisely the kind of prejudice, based on irrational fears, which the Equal Protection Clause has never permitted.

Certainly, a city has legitimate objectives in the health and safety of its residents and in the character of its neighborhoods. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The objectives posited here by the City—the lessening of congestion in the streets, securing safety from "fire and other dangers," the avoidance of undue concentrations of population, "the well being of the [group home's] residents" and the "interests of the surrounding neighbors[,]" City's Br. 24—may, in some contexts, be legitimate objectives of the zoning ordinance as a whole. However, they are not a legitimate basis for excluding group homes for the retarded from all of Cleburne's R-3 districts.

The absence of a rational relationship between the classification at issue here—singling out retarded people

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[5] Courts already have employed the same or similar standards to invalidate official discrimination against retarded people or to find distinctions such as those drawn in the ordinance baseless. In *Fowler v. United States*, 633 F.2d 1258 (8th Cir. 1980), the court, without deciding whether a higher level of scrutiny was demanded, employed the rational basis test to invalidate a federal employment classification drawn on the basis of mental retardation. In *Kastendike v. Baltimore Association for Retarded Children, Inc.*, 267 Md. 389, 297 A.2d 745 (1972), Maryland's highest court found a zoning distinction between nursing homes and group homes for retarded people—a type of zoning distinction drawn here by the city—"inconsequential." *Id.*, 297 A.2d at 750.

for discriminatory treatment—and three of the posited objectives is easy to establish. First, nothing in the record or in the City's brief even remotely suggests that thirteen retarded people living in a group home would cause any more congestion in Cleburne than a group of thirteen people who are not retarded. The residents of the CLC group home probably would not drive their own cars (J.A. 93, Trial Finding 23). Nothing in the record suggests that they have a special propensity to slow traffic. Second, nothing in the record suggests a connection between requiring a special use permit for group homes for retarded people but not for most other congregate living situations and an increase in fire safety. The record is barren of evidence that retarded people are more likely than others to start fires. Indeed, from the outset, the City admitted that there is no connection between dangerousness and mental retardation (J.A. 7 ¶ 14 & 18 ¶ 14).[6] Finally, the special use permit requirement is unrelated to the regulation of population densities. It regulates the IQ scores, not the number, of residents in an apartment house district.

The City's other two posited objectives for the comparatively harsher treatment of retarded people are even more attenuated, and, like the three objectives just discussed, are limited to general purposes: protection of the health, safety and welfare of, on the one hand, mentally retarded people and, on the other, the City residents. Neither asserted interest has been connected in the least to the specific ordinance; nor has the City ever explained how it expected to carry them out.

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[6] The City ordinance's treatment of the fire safety question further suggests that fire safety concerns played no part in the City's discriminatory treatment of group homes. The City code made special fire safety provisions for two permitted uses in R-3 districts—nursing homes and convalescent homes. *See* P.Ex. 15, T. 7. There is no similar provision for group homes for retarded people.

The first supposed concern, the protection of residents of the home, is unpersuasive. In Texas, the state has retained and, in many aspects, preempted the authority to assure that mentally retarded people are provided with opportunities for independent living and habilitation in the community. *See* Amicus Curiae Brief for the State of Texas and the Texas Department of Mental Health and Mental Retardation ("State of Texas Br."). Extensive guidelines at the state level regulate ICF/MR's. The City, on the other hand, is not even empowered to license ICF/MRs, and its zoning ordinance contains no standards aimed at insuring the well-being of the residents of group homes for retarded people. Section 16, the zoning provision governing special use permits, sets no standards that allow or encourage the City to structure its special use permit process in a way that would enhance the well-being of occupants of a group home for mentally retarded people. On the contrary, it explicitly addresses itself solely to externalities—that is, the effects of the specially permitted use on "neighboring property." Furthermore, the City has offered no explanation for why it has singled out mentally retarded people to be the recipients of the extra protection purportedly offered by the special use permit requirement, while, for example, leaving unprotected the elderly people who live in nursing homes.

The reason is obvious: the City never contemplated such an objective until after the commencement of this litigation, and even now lacks the power to give it substantive content. In similar circumstances, the Court has refused to presume that a governmental entity was actually furthering an asserted governmental interest when that interest was far removed from its normal responsibilities. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976) (invalidating a civil service rule primarily because the asserted interest was outside the responsibility of the governmental entity asserting it). Since it is clear that the objective of the special use per-

mit could not have been to promote the well-being of the group home's residents, it should be rejected. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (asserted legislative objective may be rejected if it "could not have been a goal of the legislation").

The City's other claimed objective—that of protecting the neighbors' interests by requiring a special use permit —is not, under the circumstances, a legitimate objective. The City gives the Court absolutely no guidance on what the "neighbors' interests" are that it is trying to protect through its special use permit requirement nor what standards exist to judge them. The neighbors' health is not protected by the requirement. Nothing suggests that mentally retarded persons are inherently unhealthy, or that mental retardation is contagious. In contrast, hospitals, which treat many people with communicable diseases, need not obtain a special use permit to locate in the same district. The neighbors' safety is not protected. Retarded people are not dangerous (J.A. 7 ¶ 14 & 18 ¶ 14), and as discussed above, nothing suggests that they are prone to cause fires more than any other group of people. Homes for juveniles who have been adjudicated delinquent and halfway houses for paroled felons are permitted uses (T. 276-77).

The neighbors' only apparent interests are objections to retarded people living in their neighborhood. This concern is evident on the face of the ordinance. It places homes for retarded people in the same category as homes or hospitals for alcoholics, drug addicts, and the insane, penal institutions and all institutions which, rightly or wrongly, create fear because of a known or suspected potential for violence or anti-social behavior among some of their inhabitants.

The inclusion of mentally retarded people in the same group as drug addicts, prisoners, and alcoholics reflects, however, nothing but ignorant, irrational, and tragic prejudice. The record here reflects what is known about

mentally retarded people: they are not dangerous in any sense of the word; they are not anti-social; they threaten no one. *See* Brief of Amici AAMD at 1 n.1 (J.A. 7 ¶ 14, 18 ¶ 14; T. 140, 144-45, 164).

Indeed, the sad irony of this evident justification is that it is a product of the very isolation to which mentally retarded people have been subject for so long. Unaccustomed to mentally retarded people in the neighborhood, the City, like many others, saw them as different, strange and, most of all, threatening. Why else classify retarded people with prisoners, drug addicts, or alcoholics rather than with the elderly in nursing homes, the transient in boardinghouses, or students in fraternity or sorority houses? The classification, therefore, probably does reflect a concern for the safety of the neighborhood, but that concern is misplaced. It is based on illegitimate stereotypes, is itself irrational, and cannot be given effect. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982).

In zoning cases in particular, it is critical not to permit such stereotyped attitudes to prevail through deference to residents' opinions. In *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), and *Eubank v. City of Richmond*, 226 U.S. 137 (1912), this Court held invalid zoning provisions which gave neighbors standardless delegations of power to block proposed uses in their neighborhoods. Although there has been no formal delegation, the City nonetheless is precluded from claiming a legitimate governmental interest in simply capitulating to those vague, undefined "citizens' interests" by requiring a special use permit for group homes for retarded people, but not for other congregate living situations which result in equally intensive uses of property. The Court recently has expressed its unanimous disapproval on constitutional grounds of official discriminatory actions which embody widespread private biases:

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

*Palmore v. Sidoti*, 104 S.Ct. 1879, 1882 (1984). *See also Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring) (keeping visibly pregnant women out of sight of children invalid objective); and *Buchanan v. Warley*, 245 U.S. 60 (1917) (exclusionary zoning is impermissible to deny access to neighborhood by disfavored minority group).

Many other municipalities or neighborhoods have voiced objectives such as these in their attempts to restrict group homes for retarded people from areas zoned for single-family residential use.[7] This case does not present the circumstances found in these other cases, where a facially neutral ordinance is challenged as restricting retarded people's access to community living. The City's ordinance is unique in its intent to discriminate on its face and in its exclusion of a group home not from a single family residential district, but from a high density

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[7] These ordinances, and similar restrictive covenants, have been successfully challenged, often on the ground that retarded people living in a home constitute a "family." *See, e.g., Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981); *Mongony v. Bevilacqua*, 432 A.2d 661 (R.I. 1981); *J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 274 S.E.2d 174 (1981); *Crowley v. Knapp*, 94 Wis.2d 421, 288 N.W.2d 815 (1980); *State ex rel. Region II Child and Family Services, Inc. v. District Court of the Eighth Judicial District*, 609 P.2d 245 (Mont. 1980); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976). A case relied upon by the City, *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 252 Ga. 484, 314 S.E.2d 218, *appeal dismissed*, 105 S.Ct. 57 (1984), involved a single family zoning classification, not a high density residential classification. For that reason, and also because it involved no intentional discrimination against retarded persons, 314 S.E.2d at 221, it does not govern the result in this case at all.

residential district. It permits (without requiring a special use permit) a large variety of uses which invite group living, from boardinghouses to apartments to dormitories, and their attendant urban consequences such as congestion, traffic, and the need for increased city services. Further, it permits institutions, including hospitals and sanitariums, without special use permits. In judging the reason provided by the City for the difference in treatment, many of the broad, legitimate concerns any municipality has in restricting uses in single-family neighborhoods have little bearing in this case or must be viewed within the context of high density rather than single family neighborhoods.

At this advanced stage of the litigation, the City has yet to articulate any more than the vaguest and most general objectives for its discriminatory treatment of mentally retarded people on the face of its ordinance. Even then, it has failed to establish a meaningful connection between the discrimination and its vaguely stated objectives. The only fair conclusion to draw from the amorphous nature of the City's justifications is that the City's deliberately discriminatory actions were the result of the type of "inadvertence or ignorance," *see Schweiker v. Wilson*, 450 U.S. 221, 236 (1981), which is the hallmark of irrational legislative action. *See also id.* at 239-40 and 244 (Powell, J., dissenting) (condemning legislative distinctions drawn "thoughtlessly" and expressing skepticism about *post hoc*, unsupported hypotheses about legislative purposes).

The rational basis test under the Equal Protection Clause is "not a toothless one," *Schweiker v. Wilson*, *supra*, 450 U.S. at 234,[8] and there is special reason to

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[8] Indeed, in the last fifteen years, the Court has invoked it increasingly to invalidate laws. *See, e.g., Zobel v. Williams*, 457 U.S. 55 (1982) (distinctions based on length of residency to distribute surplus funds); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422

give it bite in this case without intruding into delicate legislative allocation decisions. Placing group homes for mentally retarded people on an equal footing with such permitted uses as nursing homes, hospitals, public schools, and homes for delinquent juveniles will not impose any additional spending requirements on Cleburne or require it to reallocate its resources in any way. It might even result in a net savings to taxpayers. *See* U.S. Br. 7 n.2. At the same time, it will give mentally retarded people access to the community by making available to them their "principal community living alternative[]" (J.A. 94, Trial Finding 30). The failure to compel the availability of such access would undercut in two ways the principles underlying the Court's usual deference to legislative distinctions as expressed in cases such as *Vance v. Bradley*, 440 U.S. 93 (1979):

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the political process . . .

*Id.*, 440 U.S. at 97 (footnote omitted). The predicate of the *Vance* presumption is markedly absent here. Excluding mentally retarded people from the community necessarily excludes them from having an impact on the political process. At the same time, it insures that the stereotypes that originally gave rise to the antipathy leading to the exclusion will be reinforced. As the Fifth Circuit insightfully wrote:

> Isolated from normal community patterns, [mentally retarded persons] can never hope to adapt. The re-

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(1982) (state administrative scheme for processing employment discrimination claims; six Justices in two opinions); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (food stamp exclusion based on unrelated members of a household); *Lindsey v. Normet*, 405 U.S. 56 (1972) (double-rent appeal bond requirement in forcible entry and detainer actions); *Reed v. Reed*, 404 U.S. 71 (1971) (statutory preference for male administrators of estates; preceded recognition of gender classifications as quasi-suspect).

> sulting awkwardness of retarded persons as well as the fact of state-sanctioned isolation further stigmatize the group and provide additional barriers to their hope for self-improvement.

726 F.2d at 199 (J.A. 129). Therefore, when cases such as this one involving the exclusion of a disadvantaged group arise, the *Vance*-type presumption about democratic rectification of improvident decisions should not be indulged.

Instead, even while employing the rational basis test, the Court must look with a sense of realism at the proffered justifications to determine whether they are anything more than *post hoc* rationalizations unconnected to the original purpose for the challenged classificatory scheme and, if they are, whether they nonetheless comfortably fit the scheme. Here, the City's justifications are transparently *post hoc* rationalizations that do not mesh at all with the challenged zoning scheme. At best, the City's discriminatory requirement that group homes for mentally retarded people obtain a special use permit, while many equally intensive uses are permitted, arose out of ignorance and a thoughtless adherence to archaic stereotypes. At the worst, the City's discriminatory requirement reflects an intent to exclude a group of people based on the unfounded fears of the citizenry. If the latter is the case, then the discriminatory treatment must fall under the principle announced in *United States Department of Agriculture v. Moreno*:

> [I]f the constitutional concept of "equal protection of the laws" means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.

413 U.S. at 534 (emphasis in original). If the former situation is the case, then the very concept of a test of rationality and *Schweiker v. Wilson*'s implicit condemna-

tion of legislative action premised on inadvertence or ignorance likewise means the discriminatory treatment of mentally retarded persons in the City's zoning ordinance must fall.

### B. *The Denial of the Special Use Permit, Primarily Motivated by the Mental Retardation of the Group Home's Potential Residents, Was Not Rationally Related to Legitimate Governmental Objectives*

The trial court found that the primary motivation for the special use permit denial was the mental retardation of the group home's potential residents (J.A. 94, Trial Finding 29). It also found that seven subsidiary factors played a role in the permit denial. They were: (1) the neighbors' attitudes; (2) the location of a junior high school across the street from the group home; (3) the fears of the elderly neighbors; (4) the size of the group home and the number of people to reside there; (5) CLC's legal responsibility for the actions of the group home's potential residents; (6) the group home's location in a five hundred year flood plain; and (7) the general presentation CLC made to the city council. (J.A. 95, Trial Finding 34). Of these seven articulated bases for the denial of the special use permit, five are discriminatory on their face and thereby illegitimate.

First, the attitudes of the neighboring property owners were clearly of utmost concern to each of the Ctiy Councilmen who voted against the home (J.A. 25, 29; T. 15, 17). For example, one councilmember testified that he paid particular attention to the neighbors' fears that retarded persons might "walk around and scare people." (T. 41). These attitudes, however, were themselves the products of prejudice, reflected in the absence of any concrete harms the neighbors were able to identify.

Second, the proximity of a junior high school is irrelevant (J.A. 41). The school itself provides educational services to about thirty students who are retarded (J.A.

92), no doubt in furtherance of the national policy of integrating the handicapped with the nonhandicapped enunciated by Congress in the Education for All Handicapped Children Act and as affirmed by this court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The City's speculative and unsupported concern that the students would tease or abuse residents (J.A. 26, 30) cannot be the basis of denial of the group home. As the Fifth Circuit emphasized, this justification is yet another in the many examples of prejudice:

> [i]f we accept that the hostility of junior high school students is a substantial concern, then any hostility may become the justification for denying a use permit. In effect, prejudice becomes its own excuse.

726 F.2d at 202 (J.A. 135).

Third, the unfounded fears of the elderly neighbors, like their hostile attitudes, cannot become the basis of legitimate governmental action. Fourth, the question of CLC's legal responsibility for its intended residents was more than adequately answered by CLC's President in his city council presentation (T. 86-87), and, as the Fifth Circuit noted, no explanation is offered as to why only retarded persons must prove their financial solvency to live in Cleburne, or as to how CLC fell short. 726 F.2d at 202 (J.A. 136). Fifth, the "general presentation" of CLC to the city council as a basis for denial of a special use permit is too vague and ambiguous to serve.

The other two articulated concerns, location of the group home in a five hundred year floodplain and the size and number of residents of the home, appear legitimate on their face. Close examination, however, reveals these too as *post hoc* justifications unrelated to any legitimate governmental purpose.

No relationship was or could be established between retardation and special danger from a flood every five

hundred years. The only council member to testify about this factor indicated that his concern reached to anyone—retarded or not—who might live in Cleburne (J.A. 28). The City itself has defined special flood hazard areas to include only those areas in a one hundred year floodplain P.Ex. 13, T. 7).[9] The house itself is probably wholly outside the floodplain because it is elevated about two feet above ground level (T. 177).

The size of the home and the number of residents are important issues, but they are not rationally furthered by denial of this special use permit. The concerns about size were articulated by the same city council members who admitted they knew nothing about mental retardation. In contrast, a phalanx of state regulatory agencies, parents, experienced professionals, and consumer organizations made the City aware that they supported the home's establishment and had determined that it was adequate to meet the needs of its intended residents. The City's feigned concern, moreover, contrasts with the utter absence of concern for space requirements in the zone for such permitted uses as nursing homes, hospitals, and boardinghouses. Furthermore, CLC demonstrated that the home would exceed all state and federal requirements for size and occupancy (J.A. 73-74; T. 180).[10] The Texas Department of Health confirmed the

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[9] The federal Guidelines for Implementing Executive Order 11988, regarding floodplain management, require that nursing homes, schools, and hospitals be located outside a 500 year floodplain if the occupants of these buildings are sufficiently immobile that a flood would present a risk of danger. 43 Fed. Reg. 6043 (1978). Residents of the group home would be ambulatory without any assistance (J.A. 93, Trial Finding 22) and thus are not in the high risk group identified by the federal government (T. 66).

[10] The State of Texas has adopted the Federal ICF/MR requirements in all respects, *compare* 9 Tex. Reg. 2139-60 (1984) *with* 42 C.F.R. § 442.400 *et seq.* (1983), including square footage requirements. *Compare* 9 Tex. Reg. 2148 (1984) *with* 42 C.F.R. § 442.447 (1983).

adequacy of the house for thirteen residents (J.A. 73; T. 6-7). Each bedroom exceeded the square footage per resident requirements imposed by the state (J.A. 76; T. 75-79, 179-181). In contrast, the City's concern about size was entirely subjective, consisting wholly of vague and inaccurate characterizations of the house as having very little yard space (J.A. 24, 25, 29) with inadequate space to relax outside (J.A. 29; T. 28). The City introduced no evidence of occupancy or building code requirements that were violated by this group home.

The City later attempted to bolster its size arguments by citing to a state regulation which limits applications for group homes made after May 1, 1982, to six residents. The regulation does not govern the Featherston home because its application was pending prior to this date (J.A. 77; T. 129-31).[11] Although the City purports to be concerned about the welfare of the residents of the group home, the determination by the State of Texas

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[11] Because there might be some confusion on this point, it should be noted that the letter introduced as P.Ex. 28 (J.A. 77) makes reference to Texas Department of Human Resources (DHR) Rule 326.35.03.004, an emergency rule effective July 13, 1981. *See* 6 Tex. Reg. 2574 (1984). As indicated in the preamble, this rule was adopted because the appropriations for the ICF/MR program would not support further growth. *Id.* The rule did two things: it imposed a moratorium on applications for the ICF/MR program; and it gave those with pending applications a 120 day grace period to complete certification requirements. *Id.* The letter from the DHR Commissioner, P.Ex. 28, tolls the running of this 120 day grace period for CLC until the exhaustion of appeals in this case. The original rule was effective until September 1, 1981, and was reenacted twice in virtually the same form *see*, 6 Tex. Reg. 3012 (1981) and 7 Tex. Reg. 53 (1982), to extend the moratorium until May 1, 1982, the date the rule limiting the size of new ICF/MRs to 6 persons became effective. The City's exhibit, D.Ex. 10 (J.A. 78), is only a *proposed* rule, and, even at that, would be DHR Rule 326.05.03.005 (not 326.05.03.004). A final version of the .005 rule applied only to applications submitted on or after May 1, 1982. *See* 7 Tex. Reg. 1641 (1982). It does not apply to the CLC group home. *See also* State of Texas Br. 15 n.7.

that this home is adequate for its purpose must control. *See* State of Texas Br. 12-16. Furthermore, an expert in the field of mental retardation, Dr. Philip Roos, testified that group homes, which are among the principal community living alternatives for retarded people (J.A. 94, Trial Finding 30), with up to fifteen residents tend to work as well as those for six or fewer residents (T. 161-62).

All of these factors are either impermissible, unfounded, or pretextual, and not one rationally furthers a legitimate governmental interest. Furthermore, overriding these factors is the fact that the City Council's vote was premised primarily on the retardation of the potential residents (J.A. 94, Trial Finding 29). The City cannot justify discriminatory actions by the circular justification that its objective was to discriminate. "Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." *In re Griffiths*, 413 U.S. 717, 722 n.8 (1973). *See also Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976) (argument that "discrimination may be justified by a desire to discriminate" is "unpersuasive on its face").

## II. Mental Retardation Is a Quasi-Suspect Classification

### A. *Mentally Retarded People Demonstrate the Characteristics That Historically Have Warranted Middle Tier Protection*

The circumstances of this case present the most compelling of situations for a vulnerable group to ask the Court to give especially careful scrutiny to official actions intentionally disadvantaging them. It does not involve a situation where retarded people are dissatisfied with their share of public resource allocations among a variety of claimants. Instead, it involves a question of meaningful access to the community in which retarded people have been denied access to what the trial court deter-

mined is the principal community living alternative for persons with mental retardation and an essential ingredient of normal living patterns for them (J.A. 94, Trial Finding 30).

From the outset of this controversy, the City, buttressed by expressions of fear and "vague disquietudes," *Watson v. City of Memphis*, 373 U.S. 526, 536 (1963), from some of the group home's neighbors, chose to categorize people who are retarded as uniformly different from people who are not mentally retarded. The fundamental fallacy of the City's approach led it to misdirect its focus. It acted on false stereotypes about retarded people rather than on what mental retardation really is. And the fallacy persists. The City's brief predictably invokes the oft-repeated adage that the Equal Protection Clause does not require things which are different to be treated as though they are the same, citing *Tigner v. Texas*, 310 U.S. 141, 147 (1940). In this way, the City apparently seeks to shift the Court's focus from a point more deeply rooted in the Equal Protection Clause—despite historical impulses to deny it, people who are retarded are, first of all, people. *Cf.* Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 6 (1977) (discussing inverse relationship between stigma and recognition as a person). They have more than just a disability, they have strengths and abilities. (J.A. 6-7 ¶ 12, 18 ¶ 12; T. 140, 144-45). *See generally* P. Williams and R. Shoultz, *We Can Speak for Ourselves: Self Advocacy for Mentally Handicapped People* (1984).

This Court previously has noted the dangers of failing to examine prevailing stereotypes in equal protection analysis. *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-26 (1982) (warning against use of "fixed" and "archaic and stereotypic" notions concerning the roles and abilities of males and females). To an even greater degree, these same dangers are pres-

ent in this case.[12] It is essential that the Court understand what retardation is and how the false stereotypes about it have been developed. The crux of this case is whether the mere possession of the trait of retardation makes a citizen less entitled to live meaningfully in an American community.

Mental retardation essentially is a problem of learning, which is ameliorable but not curable (J.A. 37-38). *See Youngberg v. Romeo*, 457 U.S. 307, 309 n.1 (1982); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 7 n.2 (1981). The standard definition of retardation is "a significantly subaverage general intellectual function existing concurrently with deficits in adaptive behavior and manifested during the develop-

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[12] In the past, the judiciary has been an occasional handmaiden to the false stereotyping and stigmatization of retarded people. In *Buck v. Bell*, 274 U.S. 200 (1927), in the course of upholding a compulsory sterilization law, Justice Holmes wrote:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.

274 U.S. at 207. The factual bases for the decision have been severely criticized and largely discredited. *See, e.g.*, Burgdorf and Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995, 1006-08 (1977). There is even substantial doubt whether Carrie Buck, whose involuntary sterilization was at issue, was retarded. *See* S. Gould, *The Mismeasure of Man* 335-36 (1981). This case presents an opportunity for reexamination of the false stereotypes embedded in *Buck*. There is precedent for such reexaminations in the context of cases invoking heightened judicial scrutiny. *See Mississippi University for Women, supra*, 458 at 725 n.10 (commenting on *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873)).

mental period." American Association on Mental Deficiency, *Classification in Mental Retardation* 1 (H. Grossman ed. 1983).[13] As the City necessarily has conceded (J.A. 6-7 ¶ 12 & 18 ¶ 12), it is not a disease, and it is not a mental illness (J.A. 38). *See Pennhurst, supra; see also Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977) ("careful attention must be paid to the differences between mentally ill and mentally retarded"). The retarded are not ill; they do not need to be hospitalized; they do not receive services in "hospitals for the feeble-minded." The different degrees of retardation are grouped into four general categories: mild, moderate, severe, and profound. About ninety-five percent (95%) of the people who are retarded fall within the mild or moderate category (J.A. 39). The CLC group home's potential residents would fit within these two categories of retardation (J.A. 93, Trial Finding 22).

Since 1938, the Court has elaborated a series of interrelated standards to aid it in determining if certain groups of citizens are especially vulnerable to invidious treatment. These concern a combination of historical mistreatment, the majority's deep-rooted misunderstandings of significant aspects of the character and ability of individuals within the targeted group, unavoidable chance, and literal or figurative isolation from the community of citizens.

The Court has employed varying verbal formulations of the standards' components. *See, e.g., Parham v. Hughes*, 441 U.S. 347, 351 (1979) (plurality opinion) (immutability); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (stigmatization); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (discrete and insular minority). In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the

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[13] The level of intellectual functioning is measured by using standard intelligence tests (J.A. 38). Adaptive behavior typically also is evaluated by using standardized instruments (J.A. 38).

Court discussed the standards in terms of whether the vulnerable group is saddled with disabilities, has been subjected to a history of purposeful unequal treatment, or has been relegated to a position of political powerlessness. 411 U.S. at 28. More recently, the Court has noted in this regard:

> Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality. . . . Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. . . . The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. . . . Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.

*Plyler v. Doe*, 457 U.S. 202, 216-17 n.14 (1982).

Regardless of the verbal formulation employed, once the Court determines that the standards fit the group—and that official action purposefully has disadvantaged it, *see Washington v. Davis*, *supra*, 426 U.S. 229—it does not evaluate the challenged action with its usual presumption that the democratic process worked with equal regard for all citizens' status. Instead, the Court determines that, because of the significant likelihood that official action targeting the vulnerable group was misdirected, the action must be viewed with some suspicion. In such circumstances, under the aegis of the Equal Protection Clause, the Court applies a heightened judicial scrutiny to the challenged action.

People who are retarded constitute a group especially vulnerable to misdirected and prejudicial actions by public officials. Heightened judicial scrutiny of official actions disadvantaging them is a constitutional necessity.

Without it, they can be subjected to exclusionary actions which will force them out of the community of citizens. They then would be foreclosed from the opportunity to rectify the community's misunderstandings. Its insight into this point led the Fifth Circuit to begin its analysis with the following observation:

> The segregation of one group from the rest of society has been the historical benchmark of unfair discrimination in this country. Such segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions. . . . [T]he effects of such segregation are especially pernicious when the outcast group lacks the political power to resist unfair categorization. . . . [U]nder those circumstances the danger is great that the statute will reflect and enshrine untrue stereotypes.

726 F.2d at 192 (J.A. 114). The City's discrimination in the case at bar exemplifies and derives from the historical status of retarded people in this country.

Public officials' reaction to retardation historically has been keyed to the principles of segregation and exclusion. This reaction, mirrored in this case by the City's effort to exclude the group home because its residents would be retarded, forms the basis for the trial court's determination that retarded people historically "have been isolated in remote, stigmatizing living arrangements." (J.A. 95, Trial Finding 32).

In 1887, California inaugurated the efforts to exclude retarded people from the normal life of the community by enacting legislation to establish institutions whose purpose was the segregation of "imbecile or feeble-minded" people. 1887 Cal. Stat. ch. 57 (repealed 1937). The segregative impulse became especially prevalent at the turn of the century when the official response to the needs of retarded people increasingly was simply to isolate them in large institutions (T. 142). The State of Texas first authorized the creation of an institution for

"the feeble minded of the state" in the Act of March 22, 1915, ch. 90, 1915 Tex. Gen. Laws 143 (repealed 1955). Its segregative purpose was clear; it was to relieve society of "the heavy economic and moral losses arising from the existence at large of those unfortunate persons." *Id.*

Those retarded people not isolated from the community through institutionalization faced other forms of exclusion and segregation. Particularly destructive was their exclusion from one of the nation's primary creations for inculcating the knowledge to function in our society—the public school system. The Court already has noted this exclusion. In *Rowley, supra*, 458 U.S. 176, the Court first construed the principal federal statute aimed at remedying the historical exclusion—the Education for All Handicapped Children Act. Before the Act's passage "many of these children were excluded completely from any form of public education . . ." 458 U.S. at 191. A large percentage of the excluded children were retarded —and now are retarded adults.[14]

Another important manifestation of public efforts to isolate retarded people was the attempt to isolate them from supposedly having an impact on the composition of the next generation. For example, the previously discussed 1915 Texas statute for creation of a "State Colony for the Feeble Minded" had as another of its stated purposes the prevention of retarded people "from reproducing their kind." 1915 Tex. Gen. Laws 143, *supra*. *See generally*, P. Tyor and L. Bell, *Caring for the Retarded in America: A History* ch 4 & 5 (1984). During the

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[14] The opinion in *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 293-97 (E.D.Pa. 1972), which was one of the major decisions providing an impetus for the new federal education legislation construed in *Rowley*, *see* 458 U.S. at 192-94, contains a telling chronicle of the prolonged mistreatment of the Nation's retarded citizens which reinforces Dr. Roos' trial testimony and the trial court's fact findings.

early years of the institutionalization movement, influenced by then-dominant eugenics theories, public officials employed two other methods to isolate retarded people from the next generation. Numerous states enacted legislation to deny retarded people the right to marry. *See generally*, Linn and Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up*, 13 Gonzaga L. Rev. 625 (1978). Compulsory sterilization laws also became commonplace. In 1907, Indiana enacted "the world's first" sterilization law directed in part at what it termed institutionalized "idiots" and "imbeciles" —that is, people who are retarded. *See* O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20, 22 (1956). Eventually, thirty-two states passed such laws, all of which included within their target groups people who are retarded. *Id.* at 43. The eugenic basis for this legislation has since been discredited. *See, e.g.*, Sherlock and Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. Rev. 943, 954 (1982).

The misconceptions about retardation that led to such mistreatment still are prevalent (T. 167). The stigmatization that was the cause and the effect of the mistreatment and isolation of retarded people has been deep and thoroughgoing. It is exemplified by the phenomenon that, as the Fifth Circuit observed, "[o]nce-technical terms for various degrees of retardation—e.g. 'idiots,' 'imbeciles,' 'morons'—have become popular terms of derision." 726 F.2d at 197 (J.A. 125). Mental retardation is so stigmatizing that its label has been used to further stigmatize groups this Court already has found to be especially vulnerable to stereotypical views. There have been persistent efforts during America's history to establish links between retardation and race, national origin, immigrants, illegitimate children, and women. *See* R. Scheerenberger, *A History of Mental Retardation* 184-85

(1983). *See generally* S. Gould, *The Mismeasure of Man* (1981). These efforts betoken an additional reason for viewing discriminatory classifications based on retardation with suspicion.

The Court's analysis of whether heightened scrutiny is appropriate for intentional, invidious discriminations against retarded people also must take into account their exclusion from the political process. Their segregation in isolated institutions and exclusion from the educational process obviously would impair their ability to participate meaningfully in political decisions affecting them; however, the exclusion in this area has been even more direct and complete. The trial court found that retarded people "historically have been excluded from the political process . . ." (J.A. 95, Trial Finding 32). The Texas Constitution retains a prohibition against "idiots" voting. *See* Tex. Const. art. VI, § 1. In Texas, until the elections statute was amended in 1983, "idiots" were denied the right to vote. *See* Tex. Elec. Code Ann., art. 5.01, subdiv. 2 (Vernon 1967), *amended by* Tex. Elec. Code Ann., art. 5.01 subdiv. 2 (Vernon Supp. 1985). As recently as 1979, most states disqualified retarded people from voting. *See* Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. at 1644 (1979). In fact, as recently as 1982, it required a written opinion from the Texas Secretary of State, *see* Tex. Elec. Op. DAD-27 (1982), to establish the right to vote for a retarded person whom an election judge had deemed an "idiot" and consequently ineligible to vote.

The immutability of the distinguishing trait is another factor the Court evaluates in determining whether heightened judicial scrutiny is appropriate. *See, e.g., Parham v. Hughes, supra*, 441 U.S. at 351. Dr. Roos' testimony explained the immutability of retardation (T. 139). Retarded people are not responsible for the condition which elicits the discriminatory response. The innocent status of retardation, like the innocent status of being a school-

age child of an illegal immigrant, *see Plyler v. Doe*, 457 U.S. at 216-17 n.14, is beyond the control of the person to whom the status is assigned.

The immutability of retardation is one of several factors that makes retarded people a discrete "class" for purposes of equal protection analysis. It clearly distinguishes them from the vaguely defined class of children residing in school districts where wealth discrimination occurs that this Court in *Rodriguez* found to be "large, diverse, and amorphous," 411 U.S. at 28. The *Rodriguez* decision's disapproval of treating "amorphous" classes as discrete groups stems in large part from the fact that such classes do not possess immutable characteristics. The City ordinance itself treats retardation as a discernible, definable status. This treatment establishes people who are retarded as a discrete class. *See Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954) (demonstrated community attitudes may establish the separateness of a class). Whatever minor definitional modifications there might be at the margins of retardation and whatever degree of retardation a particular person possesses, the City's classificatory scheme treats them all the same: to live together in the community *all* retarded people must clear an extra hurdle, of uncertain but substantial (and possibly insurmountable) height, that almost no other group must confront.

That retarded people constitute a group uniquely situated to claim that official classifications disadvantaging them should be given stricter scrutiny than more typical classifications is borne out by the record and the briefs in this action. These sources demonstrate that false, unsupported stereotypes about retardation abound and that, due to deep-seated prejudices, retarded people still are a separate "caste"—an American equivalent of Indian "untouchables."

The five city officials most involved in the decisionmaking process leading to the exclusion of the CLC group

home were the only five city officials to testify at trial. Each was given an opportunity to testify about his knowledge of retardation, the most pertinent factor underlying their zoning ordinance and their decisions. None knew anything about it. Of the three city council members who voted against the special use permit: Councilmember Bass did not know and did not try to find out what retardation is (J.A. 24); Councilmember Johns, who served three years on the board of a local mental retardation center without once meeting a retarded person (J.A. 26-27), did not know what retardation means, but guessed it meant "mentally unbalanced or something of that nature." (J.A. 27); and Councilmember Martin could do no more than "guess it would be unstable." (J.A. 30). His guess was wrong, as Dr. Roos' testimony makes evident (J.A. 37-38). Given the councilmembers' testimony, their actions could have been based on nothing more than unexamined and false stereotyped views about retardation, reinforced by the unspecified, but effectively expressed fears of the neighbors.

The City's brief, too, is rife with stereotyped views of retarded people. For example, at one point it paints a scenario, irrelevant to the issues in this case, of what would happen if a retarded person were to live in a boardinghouse with persons who are not retarded. City's Br. 29-30. The City predictably concludes that only disaster, in several alternative forms, could result. The five alternative results posited by the City are not premised on any part of the record in this case or on citations to even one professional authority on retardation. Instead, like all the City's explanations, the results are premised on accepted but unexamined stereotypes of retarded people.

### B. *Recent, Sporadic Public Policy Successes on Behalf of Mentally Retarded Persons Do Not Mean That Deep-Rooted, False Stereotypes Have Been Extirpated and That the Conditions Calling for Heightened Scrutiny Are Not Present*

Public policy initiatives at the national and state levels over the last decade[15] on behalf of handicapped people generally or retarded people in particular have not suddenly empowered retarded people. They still are subjected to pervasive discrimination and excluded from the community of citizens based on the false stereotypes that have taken root over the years.

This very case highlights how well-entrenched the stereotypes remain. The "fears" of the neighbors which, despite their vagueness, had a palpable impact on the city council, and the complete failure of city officials to know or even try to learn anything about retardation combined to exclude the group home and frustrate the state policy of integrating retarded people into the community. The only plausible basis for these exclusionary actions was the persistence of false stereotypes about retarded people. Cleburne is not just an isolated pocket of resistance. The resistance to group homes is widespread and sometimes takes violent form. *See, e.g., Society for Good Will to Retarded Children, Inc. v. Cuomo*, 572 F.Supp. 1300, 1340 (E.D.N.Y. 1983), *vacated*, 737 F.2d 1239 (2d Cir. 1984) (noting three instances of arson in Long Island due to community opposition to group homes). The attitudes displayed by Cleburne's resistance have been noted before by a federal court which, while grappling with issues concerning institutionalized retarded people, deplored the "unfortunate bias against the mentally retarded . . . un-

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[15] *See, e.g.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*; Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*; Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann. art. 5547-300 (Vernon Supp. 1985).

derscored by recent attempts to exclude the retarded from residential areas through zoning mechanisms." *Garrity v. Gallen*, 522 F.Supp. 171, 195 n.92 (D.N.H. 1981).

Since the 1960's, public policy initiatives indicating heightened Congressional concern about the role of racial minorities and women in our society have proliferated. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* Yet, no one has suggested that, as a result, the status of these groups in equal protection analysis has changed so that heightened scrutiny of laws discriminating against them is no longer appropriate. On the contrary, the continuing necessity for those laws demonstrates the seriousness of the problem. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), for example, the plurality opinion determined that civil rights statutes manifesting Congressional sensitivity to sex-based classifications were a significant factor militating in favor of applying heightened judicial scrutiny to such classifications.

The same is true regarding classifications based on retardation. In this term, the Court has noted the Congressional sensitivity to the "thoughtlessness and indifference" (and sometimes invidious discrimination) which has produced pervasive discrimination against handicapped citizens. *See Alexander v. Choate*, 105 S.Ct. —— (1985). The Court also noted that, in its antidiscrimination legislation, Congress has focused on the principle of meaningful access for handicapped people. *Id. See also Rowley, supra*, 458 U.S. 176 (the Court noting the Congressional focus on *access* in the Education for All Handicapped Children Act). The concerns displayed by Congress, far from supporting the argument that heightened judicial scrutiny is inappropriate and unnecessary in this case, add additional weight to the argument that it is needed here. The discrimination in this case parallels the type about which Congress has been most concerned. It is invidious and not just the result of thoughtlessness and indifference, although these elements, too, are present.

Additionally, the discrimination denied retarded people meaningful access to the community. It denied the group home's potential residents access in Cleburne to "the principal community living alternative[] for persons who are mentally retarded." (J.A. 94, Trial Finding 30). In this situation, the Congressional policies offer additional reasons for the Court to apply heightened judicial scrutiny to individious discriminations against retarded people, especially when as here the discriminations deny meaningful access to society's benefits—if not to society itself.

### C. *Use of Heightened Judicial Scrutiny for Classifications Based on Mental Retardation Will Not Invalidate All Laws That Make Such Classifications*

A determination that mental retardation is a quasi-suspect classification will not place the Court in a constitutional straitjacket. All laws that classify based on retardation will not be invalidated automatically. There will not be, as the United States suggests, *see* U.S. Br. 7, a withdrawal from the democratic arena of all debate about retardation. Instead, the Court merely will have put public officials on notice that, in light of historical mistreatment of mentally retarded people and the pervasiveness of false stereotypes about them, distinctions disadvantaging them will receive a more searching judicial scrutiny than the relatively unintensive scrutiny given such quotidian distinctions as the one involving displaced hot dog vendors in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). Notice of the heightened scrutiny should have the wholly beneficial effect of making public officials carefully examine or reexamine distinctions they have drawn based on long-prevailing stereotypes of retarded people. After the unthinking degradations that have been visited upon retarded people during this century alone, it is time for such reexamination.

The course of this Court's decisions in other areas where heightened scrutiny is applied makes it clear that a determination of quasi-suspectness in this case will not invalidate all distinctions. Gender classifications are subject to heightened scrutiny, *see Craig v. Boren*, 429 U.S. 190 (1976), but not every gender classification examined by this Court has been indiscriminately felled by the sharpened equal protection axe. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding statute requiring males but not females to register for the draft); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding statutory rape law making a gender classification). Indeed, in language applicable by analogy to claims that heightened scrutiny of classifications based on retardation would invalidate laws addressing the special needs of retarded people (including needs arising from past discriminatory treatment), the Court has stated that "a legislature may 'provide for the special problems of women.'" *Weinberger v. Wiesenfeld, supra*, 420 U.S. at 653.

Classifications based on legitimacy, too, are subject to heightened scrutiny, *see, e.g., Mills v. Habluetzel*, 456 U.S. 91 (1982); *Trimble v. Gordon*, 430 U.S. 762 (1977), but invalidation of laws making those classifications is not inevitable. *See, e.g., Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding requirement that illegitimate children meet a more onerous burden of proving paternity for intestate succession from their fathers); *Mathews v. Lucas*, 427 U.S. 495 (1976) (upholding Social Security Act provision disadvantaging illegitimate children). Subjecting alienage distinctions to heightened scrutiny likewise has not resulted in the invalidation of all laws drawing those distinctions. *Compare Bernal v. Fainter*, 104 S.Ct. 2312 (1984), *with Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). Even when distinctions are drawn on the basis of race, the paradigm of a suspect classification, constitutional invalidation has not invariably followed. *See Tancil v. Woolls*, 379 U.S. 19 (1964); *see also Fullilove v.*

*Klutznick*, 448 U.S. 448 (1980). There is no reason to expect the Court to be less discerning in applying heightened scrutiny to classifications based on retardation.

Running as an undercurrent to the arguments that the Court should ignore all the standards it has elucidated over the years and apply only minimal scrutiny to classifications based on retardation is the implication that a virtual avalanche of laws making such classifications will fall if heightened scrutiny is applied. Yet, only one law (which does not classify based on retardation) is cited as being possibly thought to be endangered. *See* U.S. Br. 21 n.7. It is part of a comprehensively administered social welfare program. *Dandridge v. Williams*, 397 U.S. 471 (1970), requires that social welfare legislation making allocational decisions receive highly deferential review. The paucity—if not outright absence—of examples of statutes making classifications based on retardation suggests that no avalanche need be anticipated.

For several reasons, the Court is unlikely to be deluged with retarded claimants asking it to invoke the heightened scrutiny appropriate when public officials intentionally discriminate on the basis of mental retardation. First, in the realm of allocation of public benefits, there will rarely be a case where intentional discrimination based on mental retardation can be established. It is for this reason that the fears expressed in the dissent from denial of rehearing below concerning, for example, comparisons of funding levels for facilities for retarded persons and hospitals for the public (J.A. 142) are misplaced. In any event, the concept of meaningful access at the core of this case is a sufficient distinguishing factor from entitlement to a specific share once access is attained. Second, in many areas involving personal rights, the heightened scrutiny accompanying a determination that mental retardation is a quasi-suspect classification will be submerged by the even more intensive scrutiny re-

quired for the denial of those fundamental rights. If distinctions are drawn based on retardation in statutes determining who may vote or through official determinations of who may marry or who may be involuntarily sterilized, the Court already strictly scrutinizes them. *See, e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (franchise); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (sterilization).

This case presents none of the difficulties just discussed. It involves the relatively straightforward claim that the Equal Protection Clause requires cities to allow retarded people to have access to the community on an equal footing with all other similarly situated people. The record reflects, and the City has conjured up nothing to refute it, that being retarded does not make one somehow less qualified to live in the community. To accept the argument that retardation alone disqualifies one from living normally amongst the community of citizens would run contrary not only to the fundamental principle of the Equal Protection Clause but also to legislative trends and professional understandings. The nearly inevitable result of such a determination would be the reinstitutionalization of America's retarded people and increased efforts to isolate them from society. The false stereotypes will have become the excuse for efforts to insure that some day they not be false. Nothing in the Constitution generally or in the Equal Protection Clause specifically allows a community to exclude from its midst (and from an opportunity to live a meaningful, productive life) a group of people it deems less than equal merely because they are not as smart as most people.

## III. Neither the Zoning Ordinance on Its Face nor the Special Use Permit Denial Can Survive the Scrutiny Required When a Quasi-Suspect Classification Has Been Made

A governmental classification based on a quasi-suspect class must be substantially related to an important governmental interest. *See e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976). This standard for scrutinizing legislative classifications under the Equal Protection Clause is a more exacting one than the rational basis standard whose basic formulation often has been stated by the Court, *United States Department of Agriculture v. Moreno*, *supra*, 413 U.S. at 533 ("rationally related to a legitimate governmental interest"). Because the City has intentionally discriminated against mentally retarded people and because mentally retarded people constitute a quasi-suspect class, *see* Part II, *supra*,[16] the Court must scrutinize the City's discriminatory zoning actions to determine whether their bases were substantially related to important governmental interests.[17]

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[16] The history of purposeful, unequal treatment recounted there suggests that retarded people meet the criteria for treatment as a suspect class; however, the City's actions fall under whatever degree of scrutiny is applied, and, therefore, the Court need not determine that question.

[17] Even if retardation, standing alone, is determined not to be a quasi-suspect classification, another consideration still makes heightened scrutiny appropriate in this case. The trial court's twin fact findings that group homes are the *principal* community living alternatives for retarded people and are an *essential* ingredient of normal living patterns for them (J.A. 94, Trial Finding 30) means that the City's prohibition of the operation of the CLC group home—which was to have been the first one ever in the City—effectively denied the group home's potential residents of the only community shelter meaningfully available to them. While shelter is not a fundamental constitutional right, *Lindsey v. Normet*, *supra*, 405 U.S. at 74, it clearly is among the more important societal benefits. This case, therefore, presents the Court with a confluence analogous to the one presented in *Plyler v. Doe*, 457 U.S. 202 (1982): persons not

The City's articulated objectives and its explanations of the relation of its discriminatory actions to those objectives already have been canvassed in great detail in the portion of this brief discussing the rational basis standard of equal protection analysis. *See* Part I, *supra.* Because the City's actions cannot survive even the rational basis standard of review, it perforce follows that they cannot survive the more intensive scrutiny required in this case.

The City, as the party seeking to uphold a quasi-suspect classification, has the burden of showing an "exceedingly persuasive justification" for its discriminatory acts. *See Mississippi University for Women v. Hogan,* 458 U.S. at 724; *see also Wengler v. Druggists Mutual Insurance Co.,* 446 U.S. 142, 151 (1980). As the extended analysis in Parts I.A and I.B, *supra,* establishes, the City's justifications for its discriminatory ordinance and its discriminatory denial of the special permit fall far short of being exceedingly persuasive.

Instead, the primary purpose posited by the City for its zoning ordinance's invidiously distinctive treatment of retarded people—protection of the neighbors' interests—itself was based on false stereotypes and unsupported notions of what retardation is. In another context, the Court already has indicated its disapproval of such falsely-based objectives. *See Hogan,* 458 U.S. at 725 ("[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions").

The councilmembers' decision to deny the special use permit, primarily motivated by a factor about which they

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responsible for their status and historically subject to discrimination are seeking minimal access to basic societal benefits. At such confluences, constitutional protections broaden somewhat beyond their normal bounds and the intermediate tier of equal protection scrutiny is applicable.

admittedly knew nothing, likewise cannot withstand the more intensive scrutiny the Court applies to quasi-suspect classifications. Their "mechanical application of traditional, . . . inaccurate[] notions" about retardation rather than a "reasoned analysis" of what it entails is constitutionally insufficient. *See Hogan*, 458 U.S. at 725-26.

The City's *post hoc* rationalizations for its exclusionary zoning actions do not meet the *Craig v. Boren* equal protection standard. They reflect that its actions were predicated on an entrenched prejudice incompatible with the constitutional understanding that each person—including those who are retarded—is to be judged individually and is entitled to equal justice under law. *See Plyler v. Doe, supra*, 457 U.S. at 216-17 n.14. The City denied persons who are mentally retarded the equal protection of its laws.

## CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed, and the case should be remanded to that court with instructions to remand it to the district court for further proceedings on the issue of damages consistent with the Court's opinion.

Respectfully submitted,

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